

1779. January 28.

MICHAEL LADE *against* ROBERT SCOTT.

SOPHIA, Lady Cranston, in her marriage-contract with Lord Cranston, was provided in a jointure of L. 700.; in security of which, she was infeft in his Lordship's estate of Crailing.

This estate being brought to a judicial sale by his creditors, was purchased by Robert and Walter Scott, and the purchasers were entitled to retain a considerable part of the price to answer the jointure.

Lady Cranston survived her husband, and was afterwards married to Michael Lade, Esq.

The postponed creditors of Lord Cranston used diligence in the hands of the purchasers of the estate, who brought a multiplepoinding, upon which a litigation ensued as to the effect of a renunciation granted by Lady Cranston of her jointure. In the end she and her husband prevailed, and the Court preferred him, as in the right of his wife, to the interest of the retained sums, for payment to him of the annuity then due, "and in time coming, during the life of Lady Cranston." In consequence of this judgment, the bygone annuities were paid up by the purchasers; but they refused to make any further payment of Lady Cranston's annuity to Mr Lade, unless either Lady Cranston should join in the receipt, or Mr Lade should, along with each discharge, produce a certificate from a Justice of Peace, certifying Lady Cranston to be still alive, and that he knew her to be Lady Cranston, the widow of Lord Cranston.

*Pleaded* for Mr Lade; That his marriage with Lady Cranston being a legal assignation to him of this annuity, a discharge, or receipt, from him, is all that the purchasers can demand. Every person who is in possession of a right, the endurance of which depends upon his own life, or that of another, is entitled to the benefit of the legal presumption in favour of life. The *onus probandi* lies upon those who affirm that such right is expired. This is exemplified by Lord Bankton, in the case of a liferenter of lands, assigning his liferent and going abroad, "The assignee is entitled to continue in the possession by virtue of the liferent, unless the liferenter's death is proved, or that he should be 100 years old; till which term the presumption for life takes place;" B. 2. T. 6. § 31. And so it was decided in the case of Carstairs against Stewart, 30th July 1734, No 311. p. 11633.

Mr Lade is as fully in possession of this annuity as the nature of it will admit. The purchasers have actually made payments to him, and he has drawn the whole of the annuity since its commencement till now. He is not, therefore, bound to produce any evidence of Lady Cranston's being in life. This will hold, at least, until the purchasers shall show they have some reason for suspecting that she is dead.

*Answered* for the purchasers; In every case, a person who is *in petitorio* must support, by evidence, the fact on which his claim is founded. There is no ex-

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The husband of a liferenter was found entitled to uplift her annuities on his own discharge, without producing certificates that she continued in life, which was presumed.

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ception from this rule in the case of a claim depending on the fact, that a person is alive. The legal presumption in favour of life, operates only where a party is *in possessorio*. This was the ground of the judgment in the decision Carstairs against Stewart, where an assignee, under a liferentrix, was in possession of lands, out of which the proprietor attempted to remove him. The assignee admitted, "That, were he insisting for possession, he must prove his libel, viz. the existence of the liferentrix."

The purchasers are in possession of the whole of Lord Cranston's estate; Mr Lade is merely *in petitorio*, and cannot obtain payment of the annuity without claiming it from the purchasers. The *onus probandi*, therefore, lies on the assignee, and he must prove the fact, that Lady Cranston is in life, either by getting her subscription to the discharge, or by the certificate proposed.

It does not alter the case, that Mr Lade has already received payment of by-gone annuities, without being required to produce such evidence. It is no doubt optional to the purchasers to dispense with this evidence, if they choose.

THE COURT, by their last interlocutor, "found, that Mr Lade is entitled to uplift the annuities in question during Lady Cranston's life, upon his own discharges, without producing any certificates of her being in life at the terms for which the annuities are payable; reserving to the purchasers to apply to this Court by suspension, in the event of Lady Cranston's death, or of their having reasonable cause to suspect or believe her to be dead."

Lord Ordinary, *Auchinleck*.

Alt. Lord Advocate, *H. Erskine*.

For Lade, *D. Rae, Alex. Elphinston*.

Clerk, *Campbell*.

*Fol. Dic. v. 4. p. 135. Fac. Col. No 61. p. 108.*

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1782. July 26.

HENDERSON against HENDERSONS.

HENDERSON, by his marriage-contract, made certain provisions in favour of the children of the marriage. Afterward having acquired additional funds, he made a total settlement of his effects on four children then existing, reserving therein a power of revocation. Several years afterward, he conveyed an heritable debt to his three elder children, in consideration of their exonerating him of all the provisions in the contract of marriage, or all they could claim through his marriage with their mother, "or any provision heretofore conceived in their favour;" and in these terms they granted him a discharge of all such provisions. On Henderson's death, the total settlement in favour of the whole children was found unrevoked. The youngest child, who had no share in the conveyance of the heritable debt, claimed the whole of her father's succession, as executrix, exclusively of her brothers and sister; and *pleaded*, That they were excluded by the discharge they had granted, of all claim to 'any provisions heretofore conceived in their favour.' THE LORDS found, That as the